No. 17209

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD G. BIBLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in an indictment following a jury trial. This Court has jurisdiction to entertain this appeal and to review the judgment under Title 28, United States Code, Section 1291.

II.

STATEMENT OF THE CASE.

The Indictment which is set forth as Appendix A charges appellant with procuring the commission of the offense of illegal importation of narcotics in violation of Title 21, United States Code, Section 174, and Title 18, United States Code 2. Before the trial a motion to suppress evidence by appellant was heard on October 25, 1960, and denied after testimony had been taken out

of the presence of the jury. At this hearing appellant (the only witness called by appellant) disclaimed any interest to the evidence (heroin) which he sought to suppress [R. T. 13].*

The trial proceeded immediately following the hearing on the motion to suppress [R. T. 33]. A verdict of guilty was returned on October 26, 1950 [R. T. 255]. On November 22, 1960, appellant was sentenced to imprisonment for a period of ten years [C. T. 71].** Timely notice of appeal was filed [C. T. 72]. Thereafter a motion to proceed *in forma pauperis* was denied and the District Court certified on July 30, 1961, pursuant to Section 1915, Title 28, United States Code, that said appeal was not taken in good faith. Subsequently this Court on November 22, 1961, granted leave of appellant to proceed *in forma pauperis*.

III.

SPECIFICATION OF ERROR.

Appellant has specified that the trial court committed error:

1. In denying appellant's motion to suppress the narcotics brought into the United States from Mexico by Nehemiah Steele and in admitting same into evidence;

2. In the instructions on accomplice testimony;

3. In admitting evidence of "prior misconduct" of appellant.

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*R. T. refers to Reporter's Transcript of Proceedings.
**C. T. refers to Clerk's Transcript of Record.

IV.
STATEMENT OF FACTS.

On the morning of September 1, 1960, appellant picked up Leon Matthews and a person named "Frenchie" on Jackson Street in Seattle, Washington, in his 1959 Ford [R. T. 112, 114]. He told Matthews he was going to California, indicating Fresno or Bakersfield [R. T. 112, 113].

Appellant then went to his mother's house in Seattle where he picked up his brother-in-law, Nehemiah Steele, who had no money, advising Steele that he was going to Los Angeles [R. T. 129, 130]. Bible then drove with the other three men in his automobile from Seattle through Fresno and Bakersfield to Los Angeles stopping only for gas and food, which appellant paid for [R. T. 116-118, 131]. At Los Angeles "Frenchie" left the group, and Bible told Matthews and Steele that they would continue on to Tijuana [R. T. 117, 131]. After taking around twenty minutes "gassing" up the car in Los Angeles, Bible drove said vehicle directly to Tijuana where Bible, Matthews and Steele entered Mexico at about eight p.m. at night on September 2, 1960 [R. T. 118, 119, 131].

Steele testified that Bible parked the car in Tijuana; that he, Steele, went to a bar and had a drink and then had something to eat; that Bible was away from him at this time; that he saw Bible later when Bible handed him the "stuff" [Ex. 1A] stating, "We will start back out;" and told Steele to "walk on across with it." [R. T. 132-134]. Steele testified he thought the package was heroin, but he didn't open it to look at it and that he was supposed to meet Bible at a

filling station outside the Customs office in the United States [R. T. 134, 135].

Steele testified further that he had made about four trips to Tijuana previously with Bible in which he, Steele, had walked across the border with similar packages after same had been passed to him in Mexico by Bible; and that he had thereafter met Bible on the American side of the border [R. T. 135-137]. The court received this testimony only for the purpose of showing intent and state of mind of the appellant, fully instructing the jury as to its limited nature both at the time the evidence was received and later in the formal instructions, as set forth in Appendix B [R. T. 137]. Bible told Steele he would receive one hundred dollars for taking this package across the line and Steele had received one hundred dollars on each of the prior occasions from Bible [R. T. 139, 140]. On those occasions he personally carried the substance to Seattle and gave it to Bible there [R. T. 137]. On three of the occasions Steele had met Bible at the filling station across the border and one time he caught the bus and met Bible in Los Angeles [R. T. 147].

On cross-examination, Steele testified he had plead guilty to the indictment [R. T. 141; Appendix A]; denied that he had implicated Bible, his brother-in-law, for any reason other than that after he was arrested with the narcotics he "had no other alternative but to go on and tell the truth about it." [R. T. 149, 150].

Steele after receiving the package from Bible, was left in Tijuana by Bible, and Bible and Mathews immediately thereafter drove to the border [R. T. 121, 127] where appellant was observed by Acting Customs Inspector Timmerman on September 2, at about 11:15

p.m. driving the 1959 Ford into the United States from Mexico at the San Diego Port of Entry with Matthews as his passenger [R. T. 82-84]. Timmerman directed the car to secondary inspection and turned the car and occupants over to Customs Inspector James Wait [R. T. 84-86].

Wait searched appellant and Matthews and did not find contraband on their persons, but observed needle marks on the arms of Matthews [R. T. 87-90]. He finished the personal searches about 11:30 p.m. and then searched the 1959 Ford in which no contraband was found, but in which about $200.00 which appellant said belonged to him was found under the front floor mat of the automobile [R. T. 90, 91]. Wait completed the search of said Ford about 12:10 a.m. [R. T. 93].

In the meantime, Steele walked to the border with the narcotics on his person after stopping to have something more to eat [R. T. 135, 145]. Steele entered the United States at about 12:05 a.m. on September 3 in the pedestrian traffic lane at the port of entry where he was observed by Customs Inspector Richard L. McCown to be walking with a group of eight or nine negro men and women [R. T. 97]. McCown questioned all of these individuals as to their place of birth and as to what they were bringing from Mexico at which time he detected a nervous condition on the part of Steele which he did not detect in the others [R. T. 97, 98]. The other persons were passed directly through [R. T. 98, 104] while Steele was escorted to a search room where he was personally searched by McCown who found a cellophane package [Ex. 1A] in Steele's crotch which contained slightly over an ounce of heroin [R. T. 76-78, 99].

On cross-examination McCown described Steele as having a rapid palpitation in the pit of his throat and "also detected a nervous twitch to the corner of his mouth and a slight tremble in his voice." McCown did not at first detect the nervous condition on the approach of Steele but upon questioning Steele he then detected the described nervous condition [R. T. 102, 103].

Appellant testified that he got together with "Frenchie," Steele and Matthews and started a trip south from Seattle on September 1, 1960. He stated it was for the purpose of going to Los Angeles for a week-end holiday and to see about getting a job in Bakersfield [R. T. 153]. He said he financed the trip and that when he got to Los Angeles he changed his mind and continued on to Tijuana after leaving "Frenchie" at Los Angeles. Bible stated he first arrived at the purpose of going to Tijuana around 3:00 p.m. o'clock (September 2) when he was in Los Angeles; that he, Steele and Matthews arrived in Tijuana later that day about 7:30 p.m. He said he intended to stay in Tijuana a couple of days but after arriving there decided to go back to Los Angeles [R. T. 155]. Bible denied at any time having the purpose of dealing or assisting anyone in dealing with narcotics and denied dealing in narcotics in Tijuana [R. T. 155, 156]. Appellant stated that in Tijuana he spent about an hour and a half at a gas station getting an oil change and some gas and then walked up and down the street with Steele where they had a few drinks while Matthews remained in the car; that he and Steele went back to the automobile together and that "Steele decided" he would stay over in Tijuana and would take the bus back [R. T. 156-158]. Bible testified he drove directly to the border with

Matthews, and claimed that while he had been in Mexico he had not acquired any narcotics, had not promised to give Steele $100.00 to transport anything across the line, and had never given Steele any money at any time to take anything across the line into the United States [R. T. 159, 160].

On cross-examination Bible admitted that he had been to Tijuana two or three times before this occasion. Appellant also admitted that it had been his 1959 Ford automobile that had been used for the trip and that he paid for the gas and drove the automobile down to Tijuana [R. T. 161, 162]. The mileage on this Ford purchased in April, 1959, at the time of the trip was about 49,000 miles [R. T. 203]. He denied that he had told Agent Spohr that he had not been in Tijuana for more than a year, and that he had not seen his brother-in-law Steele at any time on this trip [R. T. 161-163]. Bible admitted making three trips to Tijuana in 1960 and that he had $224.00 in the automobile [R. T. 166]. Bible testified that the total time he spent in Tijuana was about three and one-half hours; and that the period during the trip from Seattle to Tijuana that the auto was not being driven was about one hour in Fresno and a half hour in Los Angeles [R. T. 167, 168].

Customs Agent Clarence Spohr testified in rebuttal he had a conversation with appellant about 2:30 a.m. September 3, 1960, and that appellant told Spohr just he, Bible, and Matthews had come down from Seattle and that Steele had not come down from Seattle with him on this trip, which was the first trip he had made in over a year [R. T. 177].

V.

ARGUMENT.

A. The Trial Court Did Not Commit Error in Denying Appellant's Motion to Suppress Narcotics Brought Into the United States by Nehemiah Steele and in Admitting Same Into Evidence.

1. The Border Search of Nehemiah Steele Was Lawfully Conducted.

Appellant seeks first to have this court adopt the theory advanced in the case of *Witt v. United States,* 287 F. 2d 389 (1961), that an international traveler entering the United States through a port of entry supervised by the Bureau of Customs may not be searched for contraband unless the Customs Inspectors have probable cause to believe that the entrant is concealing contraband. This contention was exhaustively presented in the foregoing case, rehearing being denied April 3, 1961. For that reason appellee does not propose to represent in detail its opposition to another attempt to limit the power of the sovereign to control the introduction of contraband across its borders from abroad. Suffice it to say that this proposition was carefully considered by this court, which pointed out the distinction between searches at the border and those elsewhere at page 391 of the *Witt* case, as follows:

> "Much is said on this appeal about an unlawful search. This was border search; and while it, as well as any other, must be lawfully conducted, different rules of law are applicable, and for over a hundred years have been applicable with respect to the plenary power to search at the border and the more circumscribed search power existing any-

where else within the country's boundaries. This distinction was recognized by the very Congress which proposed for adoption the amendments to the Constitution, including the Fourth which prohibited unreasonable search and seizures. Plainly, 'the members of that body did not regard searches and seizures of this kind as "unreasonable" and they are not embraced within the prohibition of the amendment.' Boyd v. United States, 1885, 116 U. S. 616, at page 623, 6 S. Ct. 524, at page 528, 29 L. Ed. 746; Carroll v. United States, 1924, 267 U. S. 132, 159—160, 45 S. Ct. 280, 69 L. Ed. 543. No question of whether there is probable cause for a search exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone. That the customs authorities do not search every person crossing the border does not mean they have waived their right to do so, when they see fit."

In this case Nehemiah Steele was detected by a Customs Inspector as manifesting a nervous condition not noticeable in others of a group of eight or nine persons with whom Steele was entering the United States from Mexico at the San Diego (San Ysidro) Port of Entry. The inspector interrogated all of these persons at the time they entered the United States at said port on foot and passed all but Steele. Noticing Steele's outward manifestations of nervousness, among other things, the customs inspector conducted a personal search which resulted in the finding of over an ounce of heroin concealed in Steele's crotch.

Although Steele has not complained that he was the object of any illegal search, appellant now claims on appeal that he, Bible, can assert an alleged illegal search of another in his own behalf. This assertion comes after Bible's own counsel at the trial level apparently recognized a right to conduct a routine search at the border for the welfare of the country, contending at that time that a search of Bible would be unlawful if it went "beyond this general power and discriminate(d) for any reason, either because of improper information or because of race . . ." [R. T. 30]. However, appellant made no showing, nor is it now contended that it was shown that discrimination of the nature upon which trial counsel founded his motion to suppress was present at the search of Bible. Since appellant at the trial apparently recognized a general right to search Steele on mere suspicion, as stated in *Cervants v. United States* (9th Cir., 1959), 263 F. 2d 800, it is understandable why further details surrounding the search of Steele were not gone into. Therefore, it would appear improper for appellant to now contend that the record is "barren of anything to justify the search (of Steele) rationally" because he was objecting at the trial level to testimony such as that concerning the apprehensiveness of Steele [R. T. 97; Appellant's Br. 22]. It is significant, however, that what was stated by Steele as contrasted with others entering the United States with Steele formed a part of the basis for the search of Steele [R. T. 102, 103]. Thus the record shows a proper basis for the suspicion which the inspector obviously had to believe Steele was carrying contraband, because there would be no other reason for conducting a personal search of this person while passing through

without a search others with whom Steele attempted to enter.

The entry of Bible and Steele occurred at a port of entry where personal searches for narcotics have been found to be frequently necessary.

Witt v. United States, supra, p. 392, Note 3;

Blackford v. United States (9th Cir. 1957), 247 F. 2d 745, cert. denied 356 U. S. 914 (1958).

2. Appellant Bible Had No "Standing" to Assert an Alleged Unlawful Search of Steele.

Appellant next contends that he is entitled to move to suppress evidence seized from a third person, Steele, on the ground of an alleged illegal search of that person. Appellant, in effect, concedes that he is required under Rule 41(e) of the Federal Rules of Criminal Procedure to show that he was in some way aggrieved by an unlawful search and seizure of the object sought to be suppressed (Appellant's Br. 11). However, the evidence shows that appellant claimed no possessory ownership in the contraband; in fact, he claimed he didn't know about any contraband being brought into the United States by Steele [R. T. 13]. Notwithstanding his sworn testimony disclaiming any interest in or knowledge of the contraband carried in by another person, appellant asserts that he has standing under *Jones v. United States,* 362 U .S. 257 (1960), to complain of an alleged unlawful search of Nehemiah Steele.

But the case of *Jones v. United States, supra,* cannot confer standing, because the appellee in this case did not have nor attempt to have the advantage of contradictory positions as a basis for conviction. This is

evidenced by the fact that Appellant is charged with having "induced, procured, aided, abetted and assisted" the commission of the offense by Steele. Consistent with this theory the government did not ask for nor receive any instructions on the permissible inference of guilt arising from possession. Undoubtedly, such an instruction would be requisite to establishing the charge on the basis of possession under the *Jones* case, *supra*. It follows that the necessity for a preliminary showing of standing to suppress property seized was not eliminated; *a fortiori,* when the property was seized by a customs officer from the person of another as the result of a border search.

In analyzing the *Jones* case further, the Supreme Court at page 258 refers to the statutory provisions in that case permitting conviction upon proof of possession of the narcotics. This can only mean the provisions similar to that set forth in Sec. 174 of Title 21, United States Code, as follows:

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Since that provision was omitted from the instructions below, the conviction of Bible was obtained under instructions similar to those in the ordinary criminal case. A further distinction is noted between the charges in the *Jones* case of sale of narcotics and concealment of

narcotics by Jones, as contrasted from the instant charge that Bible abetted the importation of narcotics by Steele. It thus becomes clear that the government has not prosecuted the within case on the basis of possession within the meaning of *Jones v. United States.* Yet appellant seeks to give a person charged with a narcotic offense special status in raising a motion to suppress, not available in other Federal criminal cases, beyond the dictum in the *Jones* case, which case also held that the petitioner there made out a sufficient interest in the premises to establish him as a "person aggrieved" by the search (257 U. S. 265). This language in the *Jones* case supports the contention that standing must be properly shown by a person charged with a narcotics offense to complain of an alleged unlawful search. See also *Contreras v. United States* (9th Cir. 1961), 291 F. 2d 63 at 65.

Nor can appellant derive support for his position from the case of *Plazola v. United States,* 291 F. 2d 56, which was decided by this court in 1961 upon appeal from the Southern Division of the Southern District of California. In the *Plazola* case, Plazola and codefendant Singh were charged in two counts as principals with importing marihuana and with receipt and concealment of marihuana after importation contrary to law, while Bible here has been charged as an aider and abetter. This court specifically held the search, which occurred fifty miles inland in the *Plazola* case, was not a border search (291 F. 2d 61). In this case

the search of both Bible and Steele occurred at the port of entry. Finally, the *Plazola* case was based on possession as the following instruction on possession was given under Section 176(a) of Title 21 at page 192 of the Reporter's Transcript of that proceeding:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

In the within case not only was the similar portion of the statute (21 U. S. C. 174) relating to possession entirely omitted from the trial court's instructions, but the court instructed with respect to possession as follows [R. T. 239]:

> "It is not a necessary element that a defendant have possession of the heroin in order to commit the crime charged in the indictment. If another person having possession of the heroin should knowingly import and bring the heroin into the United States contrary to law, a defendant who knowingly aided, assisted, abetted, induced or procured such other person to commit that offense would likewise be guilty."

It is submitted that the trial court did not err in its rulings on the motion of Bible to suppress the heroin brought into the country by Steele and in admitting said heroin into evidence.

B. The Trial Court Did Not Err in Its Instruction on Accomplice Testimony.

Although Rule 30, Federal Rules of Criminal Procedure, provides for the submission of instructions by a defendant and the stating distinctly of the matter to which he objects, the appellant for the first time asserts that the instruction on accomplice testimony was " 'plain error' because it precluded the jury from fairly considering that Nehemiah Steele alone was guilty."

This instruction is set forth at R. T. 235 as follows:

> "An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict a defendant upon the unsupported testimony of an accomplice, unless you believe the unsupported testimony beyond a reasonable doubt."

In determining whether this instruction confused the jury it should be read in the light of all the other instructions and statements by the court, including the court's comment at Reporter's Transcript 246 as follows:

> "Now you come down to what is the issue in the case, and it is a relatively simple case. The issue

is, do you believe Steele, plus the supporting matters that might assist you in that respect? Or, do you believe the defendant and the supporting matters that you might find in the evidence that would support his story? Who is telling the truth? It is just that simple.

"If you believe Bible that he knew nothing about Steele's activities and that Steele was off on a lark of his own and brought this across, if you believe Bible, then you have a duty to acquit him. On the other hand, if you are convinced, beyond a reasonable doubt, that Bible has not told the truth and that Steele has and that it was a prearranged plan by which Bible would again pick up Steele across on the American side of the border, then you have a duty to convict the defendant. It is just that simple. Whom do you believe in this case?"

The present claim that the instruction suggests that Steele was in fact united with appellant in the commission of crime was not noted in any way by appellant's astute trial counsel who argued vigorously before the jury to the effect that Bible did not participate in any way in the commission of this offense [R. T. 210-230]. Where a defendant has been convicted by the jury on a fair charge only the strongest kind of showing that justice has miscarried will avail him of the proposition of plain error. *Moore v. United States,* 161 F. 2d 932, 933 (5th Cir., 1947). In this connection it is noted that the trial court in its certificate that the appeal was not taken in good faith, dated July 30, 1961, found that the case against appellant was clear and his guilt overwhelming.

Finally, in the case of *United States v. Finazzo* (6th Cir. 1961), 288 F. 2d 175, Cert. Den. Oct. 9, 1961, 368 U. S. 837, the court held that a failure to give a cautionary instruction on an accomplice's testimony was not reversible error. The *Finazzo* case points out that the better practice is to give a cautionary instruction on an accomplice's testimony. This practice was of course followed by the trial court in this case and the cautionary instruction as to accomplice testimony was proper, particularly since there is no indication in the record that it was in any way misconstrued by the trial jury.

C. The Trial Court Did Not Err in Admitting Evidence of Prior Similar Trips to Tijuana by Bible and Steele.

After testifying about the trip from Seattle to Tijuana culminating in his receipt from Bible of the narcotics to carry across the border into the United States, Steele testified that he had made trips to Tijuana from the United States with appellant on previous occasions and that on those occasions he had carried similar packets from Mexico for appellant for which he received $100.00. On three of these occasions he rejoined Bible at a service station in San Diego (San Ysidro) and on a fourth occasion he met Bible in Los Angeles, on each occasion personally carrying the narcotics to Seattle where he gave same to Bible [R. T. 135-137, 139, 140, 147]. The court instructed the jury in the form of instruction set forth at 27 F. R. D. 39 on the limited nature of this testimony as set forth in Appendix B.

Appellant concedes that evidence of prior misconduct is admissible to show knowledge, intent, identity, mo-

tive or scheme, but claims that the court erred in admitting this testimony of prior trips for any purpose and in its instructions thereon. The basis of appellant's contention that such evidence was not properly admitted appears to arise from the denial of appellant that he had anything to do with Nehemiah Steele obtaining narcotics or importing them into the United States. On the basis of this denial appellant argues that such evidence of prior trips would be proper only had Bible admitted putting the packet into Steele's hands, while denying knowledge of its contents, or putting it there while claiming his conduct was inadvertent or that he believed Steele would refrain from crossing with it into the United States. In support of this theory appellant contends further that the evidence of the 1100 mile continuous two-day trip by Bible and Steele from Seattle, Washington, to Tijuana, Baja California, Mexico, leading to the spending of about three and one-half hours in Tijuana could only be considered as an innocent trip because there was no evidence of express reference to narcotics by the parties before entering Mexico. For that reason, appellant argues, this evidence of prior trips cannot be considered with respect to the intent, state of mind, and knowledge with which Bible performed the act of bringing Steele into Mexico. However, appellant overlooks the commonly known fact that those engaged in narcotics transactions seldom if ever refer to narcotics by name, and that if reference to same is deemed necessary it is made in the language of

terms known to the parties. It would indeed be a strained construction of the evidence if an absence of testimony referring to narcotics as such before arriving in Tijuana were allowed to preclude the factfinder from considering that Bible's act in bringing Steele into Mexico was done with criminal intent.

A conviction should be sustained on appeal if there is substantial evidence, taking the view most favorable to the Government to support it. In considering the facts the reviewing court must grant every reasonable intendment in favor of appellee.

> *United States v. Glasser,* 315 U. S. 60, 80 (1942);
>
> *Arena v. United States,* 226 F. 2d 227, 229 (9th Cir. 1956), Cert. Denied, 350 U. S. 954 (1956).

Counsel at the trial level ably tried the case in behalf of appellant in accordance with his theory of defense, which of course came *after* the evidence of prior similar acts. The record reflects not only no motion to strike the testimony of prior trips, but also that there was no basis for striking said testimony because Bible's actions in transporting Steele from Seattle to Tijuana speak in this record louder than words. The jury was entitled to consider his prior acts in transporting Steele from the United States to Tijuana in connection with the intent and state of mind with which Bible transported Steele to the same place on the latest trip.

VI.
CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the court below should be affirmed.

Respectfully submitted,

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THOMAS R. SHERIDAN,
Assistant United States Attorney,
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ELMER ENSTROM JR.,
Assistant United States Attorney,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ELMER ENSTROM, JR.,
Assistant United States Attorney.

APPENDIX "A".

Indictment.

In the United States District Court, in and for the Southern District of California, Southern Division.

July, 1960, Grand Jury, Southern Division.

United States of America, Plaintiff, vs. Howard G. Bible, Nehemiah Steele, Defendants.

No. 29575-SD (U. S. C., Title 21, Section 174; U. S. C., Title 18, Section 2—Importation of narcotics; aid and abet).

The Grand Jury charges:

On or about September 3, 1960, in San Diego County, within the Southern Division of the Southern District of California, defendant Nehemiah Steele did knowingly import and bring into the United States from a foreign country, namely, Mexico, a certain narcotic drug, namely, approximately one and one-half ounces of heroin, contrary to law, and defendant Howard G. Bible induced, procured, aided, abetted and assisted in importing and bringing into the United States from Mexico said narcotic drug contrary to law.

A True Bill

.....

Foreman

Laughlin E. Waters
United States Attorney
EE/rs

APPENDIX "B".

Instructions by Judge Carter at line 16, page 137, to line 6, page 139, of Reporter's Transcript of proceedings:

"The Court: Ladies and gentlemen, let's see if I can instruct you as to the limited purpose of this proof. Proof of prior offenses of a similar nature is admissible, either offenses that were committed without being detected or offenses for which a defendant was convicted, are admissible for a limited purpose. We don't have a 'bad boy' statute. You can't say, 'Well, he did this on previous occasions. Therefore, he must have done this on this occasion.' That is not permissible. You have to decide what happened on this occasion that the indictment refers to on the basis of the evidence here. But this proof of prior occurrences of a similar nature is admissible on the question of intent.

In every case there must be, before you can convict a defendant, a union of, or joint operation of, act and intent. The law does not punish for felonies unless there is a wilful act and, the Court will instruct you later, a guilty mind, a sense of wrongdoing on the part of the defendant.

So therefore the issue of a defendant's intent is always involved in a felony case. And on the issue of intent only, prior occurrences may be considered to help you in determining what was the intent of the defendant on the time named in the indictment.

To use an example foreign to this case. Suppose a defendant had done a certain act and there was considerable doubt in your mind whether the act he did was done with criminal intent, with a guilty mind, or

had been done inadvertently or accidentally. Proof that he had done a similar act which was an unlawful act on prior occasions might or might not assist you in determining what his intent was on the time in question.

Have I made myself clear?

On the other hand, you can't say, 'He committed some similar crimes in the past or similar offenses in the past, therefore he committed this one.' It isn't quite that simple. That is what we call a 'bad boy' statute. You can't convict a defendant because he was a bad boy in the past. If he is to be convicted, he must be proved guilty beyond a reasonable doubt of the offense charged in the indictment. You may consider proof of prior offenses of a similar nature as bearing on the question of his intent or lack of intent at the time alleged in the indictment."

Instructions by Judge Carter at line 23, page 240, continuing to line 6, page 242 of Reporter's Transcript of Proceeding:

"The next instruction I want to give you concerns how you are to consider the testimony offered by the Government through Nehemiah Steele about the prior trips to Tijuana and the prior acts as testified by Steele of Steele's bringing heroin across and Bible's having transported him down and getting him on the other side, with the exception of one instance where Steele went clear back to Los Angeles or Seattle by bus with the heroin. I gave you a limiting instruction at that time. Here is the detailed instruction. If there is any doubt between what I said at that time and what I say now, you will follow this formal instruction. Evi-

dence that an act was done at one time or on one occasion is no proof whatever that a similar act was done at another time or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of like nature may not be considered in determining whether the accused committed any offense charged in the indictment. Nor may evidence of alleged earlier acts of like nature be considered for any purpose, unless the jury may first find that the other evidence in the case, standing alone, establishes, beyond reasonable doubt, that the accused did the particular acts charged in the indictment. If the jury should find, beyond a reasonable doubt, from other evidence in the case, that the accused did the acts charged in the particular count of the indictment, then the jury may consider evidence of an alleged earlier act of like nature in determining the state of mind or intent with which the accused did the act charged in the particular count. And where proof of an alleged act of like nature is established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the act charged in the indictment under consideration, the accused acted willfully and with specific intent and not because of mistake or inadvertence or other innocent reason."